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April 18, 2012

The Honorable Lisa Jackson
Administrator
Environmental Protection Agency
Ariel Rios Building
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator Jackson:

The Environmental Protection Agency (EPA) announced over a year ago that it would undertake a "scientific assessment of the Bristol Bay watershed" in Alaska in response to a petition to preemptively veto development, in that area, under section 404(c) of the Clean Water Act. These actions materialized in response to the potential development of the so-called Pebble Mine.

Since that project became a possibility, I have encouraged all stakeholders to withhold judgment until 1) a detailed development plan is released for review and 2) all relevant analyses of that plan are completed. A preemptive veto, just like a preemptive approval, would be based purely upon speculation and conjecture. It would deprive relevant government agencies and all stakeholders of the specifics needed to take an informed position. As I have communicated to you in the past, this would be an unacceptable outcome to me.

Even as the EPA proceeds with its watershed assessment, I have continued to hear from many Alaskans about it. They are concerned about everything from the potential development of a mine and the importance of our state's fisheries to the need for a fair permitting process and the potential economic benefits of mineral development. Needless to say, I remain apprehensive about EPA's handling of this matter generally, but I write today regarding one particular issue.

Setting aside my opposition to a preemptive veto of a mining project that has not yet applied for a permit, I am worried about the unintended consequences for other development should the EPA decide to take such action. Specifically, I remain concerned that an attempt to preemptively veto the Pebble mine would have the practical effect of halting any development in the Bristol Bay area that might generate dredge or fill material. It remains unclear to me how dredge or fill material from a mining operation might be substantively

different from dredge or fill material generated from any other form of development.

In my letter to you of February 16, 2011, I raised this issue and asked a pair of detailed questions. I was disappointed to find that your response of March 21, 2011 did not definitively answer either of those questions, both of which appear with the responses that the EPA provided in the attachment. Since our exchange, and in continuing to hear from my constituents about the EPA's activities in Alaska, I have only become more concerned. It was my hope that a recent meeting with EPA officials would finally alleviate some of these concerns, but I regret that it failed to accomplish that objective as well.

On March 6th, members of my staff met with EPA's Region Ten Administrator, Dennis McLerran. Consistent with my past inquiries, they asked Administrator McLerran about the potential impact of a preemptive veto of development in the Bristol Bay watershed for not only mining, but all other development. They were told that the watershed assessment would be narrowly crafted to look at hypothetical mining activities and that any preemptive veto would be similarly structured to avoid impacting other development. I ask that you provide further, written clarification on this matter.

In particular, I fail to see what grounds the EPA might have for asserting that dredge or fill generated by a hypothetical mine – and the acceptability of impacts resulting from its disposal – is any different from dredge or fill material generated by any other hypothetical development. Given the EPA's apparent comfort with consideration of hypothetical scenarios, and for purposes of more definitively answering my previously submitted questions, I ask that you do so again.

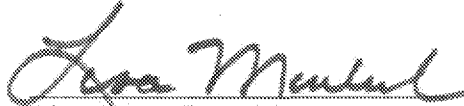
Specifically, please assume that EPA goes ahead with a preemptive veto of mineral development in the Bristol Bay area. Having done so, please consider the possibility of a subsequent proposal to develop an airfield – one that would generate, and require disposal of, dredge or fill material – in the same area. If a third-party litigant sued to prevent construction of this hypothetical airfield, please describe the legal grounds upon which that challenge might be reliably defeated and the airfield development allowed to move forward.

To date, I have not received a satisfactory response to this question, no matter how it has been phrased. This makes me very concerned, so I appreciate any assistance you might be able to provide in clarifying the matter and hope that the more specific example provided herein will be helpful to that end. In attempting to answer this question, I ask that you do so no later than – and ideally prior to – the issuance of the watershed assessment that the EPA has undertaken. To be clear: I will view as fatally flawed any assessment that does not include, or is not accompanied by, an official legal opinion from the administration on this matter. I further ask that your analysis be performed in conjunction with the Department of Justice and the EPA's Solicitor.

As the people of my state work to attract investment and create jobs, regulatory uncertainty is hampering those efforts and they need answers to questions about actions that the EPA is considering. This is particularly true when those actions could have a permanent and detrimental impact on our ability not only to develop Alaska's resources, but also to undertake any other forms of development in our state.

Thank you for your attention to this important matter.

Sincerely,



Lisa A. Murkowski

cc: Administrator Dennis McLerran and Attorney General Eric Holder

Question:

Should a veto be exercised preemptively within the Bristol Bay watershed - not in relation to an application to undertake specific development in the area - could that decision be interpreted by courts or future administrations to extend more broadly to all future development proposals (e.g., an airstrip, fish-processing plant, refinery, hospital, school, museum) that may require a dredge or fill disposal site?

EPA Response:

EPA's assessment is not a regulatory action. This assessment will help inform consideration of options for improving protection of the Bristol Bay watershed. EPA has made no decision at this time to proceed with a CWA section 404(c) review in Bristol Bay. As a result, we are not prepared to speculate regarding the scope of any action taken under this authority.

Question:

It seems that a preemptive veto could set a number of highly-problematic precedents. For example, the Bureau of Land Management, the U.S. Forest Service, and other federal agencies have historically been tasked with land planning decisions on federal acreage. Similarly, state lands are managed by analogous entities. Should the EPA issue a preemptive veto of an entire area which, in this case, consists largely of state lands, those aforementioned agencies would no longer be able to plan for multiple-use activities, but instead be subjected to preemptive yes-or-no decisions from the EPA under whatever speculative assumptions regarding development the EPA may choose to adopt.

Has the EPA considered the precedents that would be set by a preemptive veto? Has the EPA consulted relevant federal and state agencies regarding such a course of action? Could third-party litigants cite the veto as precedent in opposing other projects within the watershed?

EPA Response:

EPA has not made any decision regarding whether or not to initiate an advance 404(c) action at this time. As we have emphasized, we have instead chosen to work with our federal, state, and tribal partners, and the public, to assess the resources in Bristol Bay and identify options for improving protections for fisheries in the Bay that depend so significantly on clean water and a healthy watershed. We look forward to working with federal agencies, corresponding state agencies, tribes, and others to take advantage of their experience and information to support the Bristol Bay assessment. As part of the assessment process, EPA will collaborate with an extensive list of federal, state, tribal, and local government agencies and organizations; the public; private interests such as mining project proponents; and others with an interest in Bristol Bay. EPA's assessment process is being conducted in an open and transparent manner to allow the issues you have raised to be effectively raised and discussed. This information and public discussion will help inform decisions following completion of the study.